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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

ORIGINAL

In re Amendment of Section 73.202(b))
of the Commission's Rules, Table of Allotments,)
FM Broadcast Stations)
(GRAPELAND, TEXAS))

MM Docket No. 03-**RECEIVED - FCC**
RM-10725

SEP - 8 2003

Federal Communication Commission
Bureau / Office

To: The Assistant Chief, Audio Division, Office of Broadcast License Policy, Media Bureau

REPLY COMMENTS

Munbilla Broadcasting Properties, Ltd. (*MBPL*), the licensee of commercial FM Broadcast Station KBEY, Channel 223A, Burnet, Texas, Facility ID No. 40764, hereby files Reply Comments to Elgin FM Limited Partnership's (*Elgin's*) August 21, 2003 Counterproposal in this proceeding.

I. BACKGROUND

A. THE PETITION AND THE NPRM

1. Robert Fabian filed a Petition for Rule Making asking the FCC to allot Channel 280A to Grapeland, Texas as a second local service. In response, the staff issued the Notice of Proposed Rule Making (the *NPRM*), 68 Fed. Reg. 42664 (2003). Schematically, the *NPRM*'s proposal was as follows:

COMMUNITY	PRESENT	PROPOSED
Grapeland, Texas	232C2	232C2, 280A

The reference point for Channel 280A was site-restricted 11.4 km to the Northeast of Grapeland, at coordinates North Latitude 31° 32' 45", West Longitude 95° 22' 42".

B. ELGIN'S COUNTERPROPOSAL

2. Elgin has advanced the following Counterproposal. Rather than allot Channel 280A as a second local service to Grapeland, as the NPRM proposed, Elgin asks the FCC:

(a) to site-restrict the Channel 223A allotment at Elgin, Texas, occupied by Elgin's Station KKLBB(FM), Facility ID No. 19223, to North Latitude 30° 16' 12", West Longitude 97° 28' 00"; and

(b) to make that site-restriction possible, to substitute Channel 280A for Channel 223A at Burnet, Texas, and to modify the license of MBPL's Station KBEY, which occupies the Burent allotment, accordingly; and

(c) to downgrade to Class C3 status and to reallocate Channel 280C2 from Cameron, Texas to the community of Calvert, Texas as a first local service, and to relicense Station KXCS accordingly, with a change in transmitter site, to coordinates North Latitude 30° 53' 15", West Longitude 96° 31' 54"; and

(d) to make the substitution of Channel 280A for Channel 223A at Burnet possible, to site-restrict vacant Channel 281C2 at Mason, Texas to a new reference point of North Latitude 30° 45' 10", West Longitude 99° 25' 31"; and

(e) to accommodate the shift in the reference point of Channel 281C2 at Mason, to substitute Channel 252A for vacant Channel 284A at Junction, Texas.

3. Schematically, Elgin's Counterproposal is as follows:

COMMUNITY	PRESENT	PROPOSED
Elgin, Texas	223A	223A (site restriction)
Burnet, Texas	223A, 295A	280A, 295A
Cameron, Texas	280C2	---
Calvert, Texas	---	280C3
Mason, Texas	281C2	281C2 (site restriction)
Junction, Texas	284A	252A

4. All of this, Elgin claims, would allow Elgin to relocate its Station KKLBB 13.3 km to the West, to the new Channel 223A site-restricted reference point that Elgin proposes in element

(a) of its Counterproposal. Elgin claims that a statement it has proffered from Equicom, Inc., the licensee of Station KXKS, "consent[s] to the changes." Elgin states that it would reimburse MBPL for its reasonable expenses in shifting Station KBEY's frequency in accordance with Circleville and Columbus, Ohio, 8 FCC 2d 159 (1967).

5. Elgin further claims that the substitution of Channel 280A for Channel 223A at Burnet that Elgin proposes for MBPL's Station KBEY meets FCC spacing requirements. However, the veracity of this claim depends upon a downgrade of Station KEYI-FM, Channel 281C, San Marcos, Texas, to Class C0 status. Elgin claims that such a downgrade has been triggered by the June 30, 2003 filing of a Petition for Rule Making to allot Channel 291A at Center Point, Texas. Elgin further claims that due to, "... height restrictions of Bergstrom International Airport which services the Austin metro, KETYI should be unable to achieve the 451 meters required in order to keep its [C]lass C status. Therefore, the reclassification should be merely a ministerial act."

6. Elgin further claims that adoption of this Counterproposal would better serve the public interest than adoption of the proposal set forth in the NPRM.

7. The Commission has not accepted Elgin's Counterproposal for rule making, and must not, for the reasons set forth in these Reply Comments.

II. ARGUMENT

ELGIN'S COUNTERPROPOSAL IS FATALLY DEFECTIVE AND MUST BE DISMISSED

8. It is firmly established that, to be acceptable for rule making, a Counterproposal (or rule-making petition) must comply with *all* of the applicable technical and legal requirements in existence at the time of filing. See, e.g., Fort Bragg, California, 6 FCC Rcd 5817 (1991) at

n. 2; Eldorado and Lawton, Oklahoma, 5 FCC Rcd 6737 (1990); Santa Isabel, Puerto Rico and Christiansted, Virgin Islands, 3 FCC Rcd 2336 (1988), recons. den., 4 FCC Rcd 3412 (1989). See also, Farmington, California, et al., 10 FCC Rcd 9938 (1995); Kaukauna and Cleveland, Wisconsin, 6 FCC Rcd 7142 (1991); Broken Arrow, Oklahoma et al., 3 FCC Rcd 6507, 6511 n.2, recons. den., 4 FCC Rcd 6981 (1989); Brookville and Punxsatawney, Pennsylvania, 3 FCC Rcd 5555 (1988); Lonoke, Arkansas and Clarksdale, Mississippi, 6 FCC Rcd 4861 (1991); York, Alabama, 4 FCC Rcd 6923 (1989).

9. Elgin's Counterproposal fails this strict test in at least three respects.

10. First, although Elgin claims that it has provided a statement of consent from the licensee of Station KXCS, "consenting to the proposed changes," the licensee of Station KXCS has voiced its consent only to a downgrade to Class C3 status and to the relicensing of the Station to the community of Calvert — and **not also** to a site change. See Attachment A to the Counterproposal. The licensee says **nothing** about consenting to a change in transmitter site.

11. Absent an explicit statement of consent for a site change from an affected licensee, a Counterproposal is fatally flawed, is not acceptable for rule making, and will not be considered. Llano and Marble Falls, Texas, 12 FCC Rcd 6809 (1997) at n. 2, recons. den., 63 Fed. Reg. 71389 (1998); Lopez and Dushore, Pennsylvania, 7 FCC Rcd 854 (1992); Claremore Oklahoma, 3 FCC Rcd 4037 (1988). Because Elgin's Counterproposal that fails to include the required explicit statement of consent to a site change by Cameron Station KXCS, the Commission must summarily reject the Counterproposal.

12. Second, according to Elgin's own spacing study (Attachment C to the Counterproposal), the proposed site restriction of the Channel 223A allotment at Elgin, Texas

(the one that Elgin's Station KKLK occupies) is 9.72 km short-spaced to the licensed operation of cochannel Radio Station KYKM, Yoakum, Texas, FCC Facility ID No. 67287. Although Elgin's spacing study at Attachment B shows a proposed substitution of Channel 280A for Channel 223A at Yoakum,¹ there has been no resolution of MB Docket 02-248. Therefore, Elgin either had to protect Station KYKM's licensed Channel 223A facilities, or else had to propose an alternate channel for the Yoakum facility. Elgin utterly failed to do either.

13. Elgin's proposal is thus contingent upon the outcome of MB Docket 02-248, and this contingency is a fatal flaw. The FCC, "... will not accept and process a Counterproposal contingent upon the outcome of a pending rule making proceeding." Stonewall, Mississippi et al., 61 Fed Reg. 14032 (1996), citing, Broken Arrow, Oklahoma et al., supra. See also, Broken Bow, Oklahoma, DA 03-2705 (rel. September 5, 2003), at Para. 3.² Thus, the FCC should summarily reject Elgin's Counterproposal as blatantly defective and unworthy of consideration.

14. Second, Elgin's own spacing studies also reveal that the substitution of Channel 280A for Channel 223A at Burnet is fully spaced only if San Marcos Station KEYI is downgraded to Class C0 status. While that downgrade is a possibility in light of the filing by Elgin's comrade-in-arms, Charles Crawford, of a Petition for Rule Making to allot Channel 291A to Center Point, Texas, the downgrade remains, at this point, *a mere possibility*.

¹Two separate parties have suggested this substitution, in counterproposals in MB Docket 02-248. That is a very contentious proceeding in which Elgin itself has participated.

²The Entravision proposal for the Station KTCY upgrade to Channel 285C0 at Pilot Point, Texas is short-spaced to the existing Channel 285A allotment at Meridian, Texas. In this regard, a timely counterproposal in MM Docket No. 01-47 proposed the reallocation of Channel 285A from Meridian to Hico, which would remove this conflict. Thus, the Entravision proposal is contingent upon the outcome of a separate proceeding in MM Docket No. 01-47 and cannot be considered in the context of this proceeding."

15. The Commission has not yet accepted for rule making and docketed Mr. Crawford's Center Point Petition. Neither has the Commission issued an Order to Show-Cause directed to the licensee of Station KEYI. Nor — completely understandably — has the licensee of Station KEYI responded to an Order that has not yet issued. Nor has Mr. Crawford supplied a statement of consent to the downgrade from the affected San Marcos licensee.

16. Moreover, Elgin's musings that height restrictions associated with Bergstrom International Airport will prevent KEYI from perfecting its Class C status (in the event that an Order to Show Cause even issues) are rank speculation. Elgin has established no qualifications that enable it to opine on airspace issues. Further, Elgin has submitted no detailed study of:

- the area within which KEYI can exist, consistent with FCC spacing and city-grade-service requirements, as a Class C Station with an HAAT of at least 451 meters; and
- what the FAA's obstruction standards may allow in terms of structure height for all possible transmitter sites within the available area.

Far from the downgrading of Station KEYI being, "... merely a ministerial act," the jury is still out. In fact, the jury has not even been impanelled yet.

17. Moreover, Elgin's Counterproposal itself can *not* be an event that can trigger the issuance of an Order to Show-Cause to the licensee of Station KEYI. The Commission was very explicit about this in the Second Report and Order in MM Docket 98-93 (Broadcast Technical Streamlining), 15 FCC Rcd 21649 (2000):

The reclassification procedure also may be initiated through the filing of an original rule making petition to amend the FM Table of Allotments. In such cases, the Commission will notify the affected Class C station licensee of the proposed reclassification by issuing a notice of proposed rule making in accordance with the Commission's rules. However, where a triggering petition proposes an amendment or amendments to the FM Table of Allotments in addition to the proposed reclassification, such as a channel substitution, the staff will issue an order to show cause as described supra, and a notice of proposed rule

making will be issued only after the reclassification issue is resolved. We believe that this procedure is necessary to avoid disrupting the efficient and orderly processing of petitions for rule making and imposing unnecessary burdens on the parties to such proceedings. For the same reasons, reclassification may be initiated only through an original petition for rule making to amend the FM Table of Allotments, ***and not through comments or counterproposals***. Furthermore, to prevent a backlog of petitions contingent on matters in addition to reclassification, such petitions will be dismissed upon the filing, rather than the grant, of an acceptable construction permit application by the subject Class C station.

Id. at Para. 23 [emphasis added].

18. To be acceptable for rule making, Elgin's Counterproposal had to be complete and technically acceptable by the Comment deadline in this proceeding — August 22. But the Counterproposal necessarily relies on the eventual outcome of a Show-Cause Order that has not yet even issued (and, for other reasons, may never issue), and on an ultimate downgrade of KEYI-FM — which may never occur. “[I]t is Commission policy not to accept a proposal that is contingent upon final approval of changes involving other broadcast facilities. See Cut and Shoot, Texas, 11 FCC Rcd 16383 (1996).” Littlefield et al., Texas, 12 FCC Rcd 3125 (1997). “The Commission does not provide for the acceptance of contingency proposals elsewhere based on speculative results. See Oxford and New Albany, Mississippi, 3 FCC Rcd 615 (1988); recon. denied, 3 FCC Rcd 6626 (1988).” Tylertown, Mississippi, 13 FCC Rcd 739 (1998), recons. den., 14 FCC Rcd 4057 (1999).

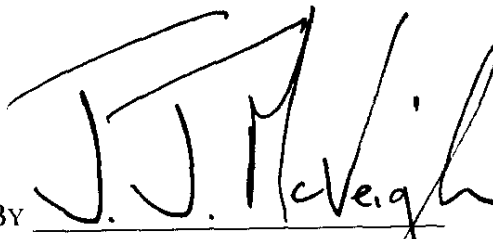
19. In light of the above-cited precedent, and because of this second contingency, this Counterproposal of Elgin's was Dead On Arrival and requires prompt burial.

III. CONCLUSION

For the reasons stated above, the FCC should promptly reject the multiply, fatally flawed Counterproposal of Elgin FM Limited Partnership.

Respectfully submitted,

MUNBILLA BROADCASTING PROPERTIES, LTD.

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DATE: SEPTEMBER 8, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this Eighth day of September, 2003, sent a copy of the foregoing **REPLY COMMENTS** by first class United States mail, postage prepaid, to:

Robert Fabian 4 Hickory Crossing Lane Argyle, Texas 76226 Petitioner in MM Docket 03-149	Elgin FM Limited Partnership 7524 North Lamar, Suite 200 Austin, Texas 78752 Counterproponent in MM Docket No. 03-149 and Licensee, Station KKLK
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J.J. McVeigh